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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/690,327	10/20/2003	John C. Carson	DWJC 03.02	2188
43755	7590	12/31/2007		
DALE F. REGELMAN CHANDLER & UDALL, LLP 4801 E. BROADWAY BLVD #400 TUCSON, AZ 85711-3609			EXAMINER GEMBEH, SHIRLEY V	
			ART UNIT	PAPER NUMBER
			1614	
			NOTIFICATION DATE	DELIVERY MODE
			12/31/2007	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary

Application No.

10/690,327

Applicant(s)

CARSON, JOHN C.

Examiner

Shirley V. Gembeh

Art Unit

1614

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 May 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-37 is/are pending in the application.
- 4a) Of the above claim(s) 12-37 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 2/17/04.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

Applicant's election of claims 1-11 and the specie election of jojoba oil in the reply filed on 5/21/07 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

Examiner has expanded the search to include previously non-elected specie but not all of the non-elected specie are examined

Information Disclosure Statement

The information disclosure statement (IDS) submitted on 5/17/04 is acknowledged and has been reviewed.

Status of Claims

Claims 1-37 are pending and claims 1-11 are under examination as elected

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 6-7 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "greater than about" and "less than about" are not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, one of ordinary skill in the art would not be reasonably apprised of the scope of the

invention, because one of skill will not be able to determine which term is in control. The claims lack clarity as to whether "greater than" (a upper limit) or "about"(broadening limitation, both higher and lower) controls the metes and bounds of the phrase "less than about". Regarding "lesser than" (a lower limit) or about "(broadening limitation, both higher and lower) it is unclear what controls the metes and bounds of the phrase "less than about".

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dong-Myung et al., EP 1,321,136 and Sebillotte-Arnaud, US 6,228,377 and Yates et al., US 3,634,286 and Seo et al., US 6,030,627 in view of Brown et al. US 4,360,387.

Dong-Myung et al. teach a cosmetic composition for treating wrinkle comprising a liquid phase ingredient -containing powder-type cosmetic, wherein the solvent is encapsulated with amorphous silica and oil. See page 3 para 0019, lines 20-29 as required by instant claim 1. The reference teaches the inclusion of a medicament, an antioxidant such as retinol and tocopherol as required by instant claim 4. See page 3 para 0024, lines 46-48. The reference further teaches the water in an amount from 70-93%. See page 4 para 0040. The reference also teaches with regard to claim 8 other

carbon-containing materials such as dimethicones, cyclometicones, see page 4, para 0038. With regard to stability, the reference teaches the composition is stable, see page 7, para 0052. The reference also teaches with regards to instant claim 4 the composition comprising of preservatives and flavoring agents, see page 6, lines 5-6. Although, the reference did not explicitly teach a suspension, one of ordinary skill in the art would have been motivated to form a suspension as the reference suggest the liquefied state of the formulation see table 8. Thus forming a suspension is within the purview of one of ordinary skill in the art.

Sebillotte-Aenaud teach with regard to instant claims 7-8 and 9 a water oil composition, wherein fumed silicas are taught as Aerosil 300 CAB-O-SIL (trade marks) and an oil from plant, animal or synthetic origin, wherein the oil is jojoba oil. See col. 3 lines 32-45 and col. 4, lines 23-35. Thus will jojoba oil a dielectric constant less than 3.5 as stated by MPEP 2112.01 "Products of identical chemical composition can not have mutually exclusive properties." A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). Therefore claims 6-7 are obvious of the teaching of the compound jojoba oil having a viscosity of greater than 200 cps at room temperature and when heated the viscosity is about 200 cps. The reference however fails to teach the different forms of jojoba oil as claimed in instant claims 10 and 11.

The reference even though uses emulsifiers also teaches away from including emulsifiers as they are set backs, see col. 1, lines 18-40. as required by instant claim 2, thus motivating one of ordinary skill in the art to use a formulation without emulsifiers.

Yates et al. teach a stable suspension comprising water with silica thus encapsulation of the particles are in water. See col. 1, lines 42-70, wherein amorphous silica is formed as mixtures. It is interpreted that having the limitation of claim 5 is obvious as consisting of mixing less than 120 seconds.

Seo et al. teach a cosmetic formulation process wherein an antimicrobial cosmetic pigment is produced by forming an amorphous glassy metal oxides wherein one or more of these oxides is comprising a pigment. See abstract. The metal oxides are silica and zinc as required by instant claims 1 and 3.

Brown et al. teach isomorphous forms of jojoba oil and hydrogenated form of jojoba oil. The reference teaches waxes of this type are used for a wide variety such as cosmetic vehicles. See col. 1, lines 10-20.

One of ordinary skill in the art would have been motivated to combine the above references and form a stable suspension that comprises an amorphous silica having various size particles in a carbon containing material jojoba oil to form a stable suspension because the above combined cited references suggest a formulation process for cosmetic can be made by using amorphous silica encapsulated in water particles and oil.

A reference is good not only for what it teaches by direct anticipation but also for what one of ordinary skill in the art might reasonably infer from the teachings. (*In re*

Opprecht 12 USPQ 2d 1235, 1236 (Fed Cir. 1989); *In re Bode* 193 USPQ 12 (CCPA) 1976).

In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a).

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

No claim is allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Shirley V. Gembeh whose telephone number is 571-272-8504. The examiner can normally be reached on 8:30 -5:00, Monday- Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin Marschel can be reached on 571-272-0718. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

SVG
12/15/07

Frederick K. Kass
Primary Examiner
AA Unit 1614
